



Written observations of the Republic of Croatia on the admissibility of
its Declaration of Intervention with regard to the objections of the
Russian Federation

In the case of
*Allegations of Genocide under the Convention on the Prevention and
Punishment of the Crime of Genocide*
(Ukraine v. Russian Federation)

10 February 2023

Introduction

1. In accordance with the Registrar's Letter No. 158447 of 31 January 2023, the Republic of Croatia submits these Written Observations on the Admissibility of its Declaration of Intervention in response to the Written Observations on Admissibility of the Declarations of Intervention Submitted by Croatia and the Czech Republic, which the Russian Federation submitted to the Court on 16 December 2022.
2. For the reasons set out below, the Russian Federation's Written Observations manifestly fail to provide any basis that would call into question the clear admissibility of Croatia's Declaration of Intervention. In **Part I**, Croatia shows that Article 63 of the Statute of the Court gives it the right to intervene in proceedings whenever the construction of a convention to which it is a party is in question. Croatia, which is a party to the Convention on the Prevention and Punishment of the Crime of Genocide, is accordingly entitled to intervene as a matter of right because the construction of that Convention – including, *inter alia*, the compromissory clause contained in Article IX – has been put in question by the Russian Federation's document communicated to the Court on 7 March 2022. In **Parts II-V**, Croatia demonstrates that each of the specific arguments raised by the Russian Federation concerning the admissibility of Croatia's Declaration of Intervention is wholly without merit and based on mischaracterizations of the relevant jurisprudence.

I. Croatia's Entitlement Under Article 63 of the Statute of the Court to Intervene in the Proceedings

3. As Croatia explained in its Declaration of Intervention submitted to the Court on 19 October 2022, Article 63 of the Statute of the Court gives Croatia the right to intervene in these proceedings in regard to the construction of the Genocide Convention.

4. Article 63, paragraph 1 of the Statute of the Court provides:

Whenever the construction of a convention to which states other than those concerned in the case are parties is in question, the Registrar shall notify all such states forthwith.

Paragraph 2 of Article 63 further provides:

Every state so notified has the right to intervene in the proceedings; but if it uses this right, the construction given by the judgment will be equally binding upon it.

Article 43, paragraph 1 of the Rules of the Court provides:

Whenever the construction of a convention to which States other than those concerned in the case are parties may be in question within the meaning of Article 63, paragraph 1, of the Statute, the Court shall consider what directions shall be given to the Registrar in the matter.

5. The Registrar, in discharge of its functions under Article 63(1) of the Statute and Article 43(1) of the Rules, by its Letter No. 156413 of 30 March 2022, duly notified Croatia, as

a State included in the list of the Parties to the Genocide Convention, that the Convention has been invoked in the present case both as the basis of the Court's jurisdiction and as the substantive basis of the Applicant's claims. Specifically, the Registrar notified Croatia that Ukraine seeks to found the Court's jurisdiction on the compromissory clause contained in Article IX and raises questions concerning the scope of the duty to prevent and punish genocide under Article I. The Registrar therefore informed Croatia that the construction of the Genocide Convention is in question in this case. Accordingly, by its Declaration of Intervention, Croatia availed itself in a timely manner of its right to intervene in regard to the construction of the Convention's provisions.

6. Subsequent developments in the case have confirmed that the construction of Article IX of the Genocide Convention, among other provisions, is indeed in question. Although Croatia does not have access to the Russian Federation's preliminary objections, it is apparent from the materials that are publicly available that the objections argue, *inter alia*, that the claims which Ukraine has put before the Court do not fall within the scope of Article IX.
7. In particular, in the document submitted by the Russian Federation on 7 March 2022 setting out its position regarding the Court's alleged "lack of jurisdiction," the Russian Federation argued in paragraph 8 that "in order to determine, even *prima facie*, whether a dispute within the meaning of Article IX of the Genocide Convention exists," the Court must "ascertain whether the breaches of the Convention" that are alleged by Ukraine are "capable of falling within the provision of that instrument and whether, as a consequence, the dispute is one which the Court has jurisdiction *ratione materiae* to entertain pursuant to Article IX."¹
8. As the Court observed in its Order of 16 March 2022, the claims to which the Russian Federation referred include Ukraine's contention that "a dispute exists between it and the Russian Federation relating to the interpretation, application or fulfilment of the Genocide Convention" in regard to "whether genocide, as defined in Article II of the Convention, has occurred or is occurring in the Luhansk and Donetsk oblasts of Ukraine and whether Ukraine has committed genocide."
9. In arguing that Article IX does not extend to that dispute, the Russian Federation has put the proper construction of Article IX, as well as other provisions of the Genocide Convention, squarely in question. As such, Croatia, as a party to the Convention, is entitled as a matter of right to intervene under Article 63 of the Court's Statute in regard to the construction of those provisions. Having satisfied all of the procedural and legal requirements for intervention under Article 63, there is no basis upon which Croatia's intervention can be refused.

¹ Document from the Russian Federation setting out its position regarding the alleged "lack of jurisdiction" of the Court in the case (7 March 2022), para. 8.

II. The Intervention is Concerned with the Construction of the Genocide Convention

10. Faced with Croatia's clear entitlement under Article 63 to intervene in regard to the construction of the Genocide Convention, the Russian Federation maintains that Croatia's intervention is somehow inadmissible because it is said to be part of a so-called "collective political strategy" of like-minded States whose purported "aim" is to "become *de facto* co-applicants and pursue a joint case with Ukraine." On the basis of this contention, the Russian Federation argues that Croatia's intervention is not genuine.² The argument is without any foundation.
11. Croatia's Declaration of Intervention makes clear that the intervention is concerned solely with the construction of the Genocide Convention and has been submitted for that purpose alone. While the Russian Federation refers to the Press Release of Croatia's Ministry of Foreign and European Affairs of 20 October 2020 as putative evidence of "a joint political effort,"³ the press release in fact confirms that the intervention is confined to putting Croatia's views before the Court in regard to the Genocide Convention's construction. It states:

As a party to the Convention, Croatia has the right to intervene in the proceedings and intends to put forth its own interpretation of the relevant provisions. In its declaration, Croatia focuses on Article IX of the Convention, stating that the Court has jurisdiction in said case.⁴

12. The Russian Federation derives no benefit from *Haya de la Torre* and misrepresents the case in such a way that it shifts an objective test, whether an intervention is genuine, into a subjective one, whether the intention for intervention is genuine. Namely, in *Haya de la Torre* the Court observed in regard to interventions under Article 63 that "a declaration filed as an intervention only acquires that character, in law, if it actually relates to the subject-matter of the pending proceedings."⁵ In that case, the Court determined that Cuba's declaration of intervention did not so qualify because the questions of construction to which it was addressed had already been adjudicated by the Court and thus were subject to *res judicata*.
13. The Court explained, "In these circumstances, the only point which it is necessary to ascertain is whether the object of the intervention of the Government of Cuba is in fact the interpretation of the Havana Convention in regard to the question whether Colombia

² Paragraph 22. of the Russian Federation's written observations on admissibility of the Declarations of Intervention of the Republic of Croatia and the Czech Republic of 16 December 2022.

³ Paragraph 8. of the Russian Federation's written observations on admissibility of the Declarations of Intervention of the Republic of Croatia and the Czech Republic of 16 December 2022.

⁴ <https://mvep.gov.hr/press-22794/croatia-files-declaration-of-intervention-in-the-case-of-ukraine-v-russian-federation/248953>. The arguments contained in the Russian Federation's Written Observations concerning the Declarations of Intervention of other States and the Memorial of the European Union are irrelevant to the admissibility of Croatia's intervention. Croatia therefore has no need to comment upon them.

⁵ *Haya de la Torre (Colombia/Peru)*, Judgment of 13 June 1951, p. 76.

is under an obligation to surrender the refugee to the Peruvian authorities.”⁶ The Court went on to state that “On that point, the Court observes that the Memorandum attached to the Declaration of Intervention of the Government of Cuba is devoted almost entirely to a discussion of the questions which the Judgment of November 20th, 1950, had already decided with the authority of *res judicata*, and that, to that extent, it does not satisfy the conditions of a genuine intervention.”⁷

14. Here, in contrast, Croatia’s intervention under Article 63 is strictly concerned with questions of construction that are necessary for the the Court’s adjudication of the Russian Federation’s objections, which require it to interpret the Genocide Convention, including Article IX.
15. Regardless, the political motivation of a State in regard to its decision to seize the Court is immaterial. As the Court recently held in its Judgment on Preliminary Objections in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar)*, “the question of what may have motivated a State... to commence proceedings is not relevant for establishing the jurisdiction of the Court.”⁸ Quoting its prior Judgment on Jurisdiction and Admissibility in *Border and Transborder Armed Actions (Nicaragua v. Honduras)*, the Court ruled that its “judgment is a legal pronouncement, and it cannot concern itself with the political motivation which may lead a State at a particular time, or in particular circumstances, to choose judicial settlement.”⁹ The Russian Federation’s Written Observations provide no explanation as to why a different rule should apply in regard to a State’s decision to intervene under Article 63.

III. The Intervention is Fully Compatible with the Principle of Equality of the Parties and the Good Administration of Justice

16. The Russian Federation’s argument that Croatia’s intervention should be refused because of professed concerns regarding the principle of equality and the good administration of justice is equally flawed.
17. Despite the Russian Federation’s attempt to suggest otherwise, such matters are not relevant to the admissibility of Croatia’s Declaration of Intervention. The Court made this clear in its Order of 6 February 2013 on New Zealand’s intervention under Article 63 in *Whaling in the Antarctic (Australia v. Japan)*, where it addressed concerns that Japan had raised concerning “the need to ensure the equality of the Parties before the Court” in

⁶ *Haya de la Torre (Colombia/Peru)*, Judgment of 13 June 1951, p. 77.

⁷ *Haya de la Torre (Colombia/Peru)*, Judgment of 13 June 1951, p. 77. When Cuba subsequently informed the Court that “the intervention was based on the fact that the Court was required to interpret a new aspect of the Havana Convention, an aspect which the Court had not been called on to consider in its Judgment of November 20th, 1950,” the Court concluded that, “Reduced in this way, and operating within these limits, the intervention of the Government of Cuba conformed to the conditions of Article 63 of the Statute” and thus decided to admit the intervention. *Ibid.*

⁸ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar)*, Judgment of 22 July 2022, para. 44.

⁹ *Ibid.* (quoting *Border and Transborder Armed Actions (Nicaragua v. Honduras)*, *Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1988*, p. 91, para. 52).

light of a joint media release by Australia and New Zealand and implications that New Zealand's intervention could have in regard to "safeguards of procedural equality under the Statute and Rules of the Court," including with respect to the appointment of *ad hoc* judges.¹⁰ In regard to such matters, the Court held that the "concerns expressed by Japan relate to certain procedural issues regarding the equality of the Parties to the dispute, rather than to the conditions for admissibility of the Declaration of Intervention."¹¹

18. Croatia's intervention does not give rise to issues regarding equality of the parties. Indeed, unlike *Whaling in the Antarctic*, where a national of the intervenor, New Zealand, was a judge on the Court (a situation which the Court determined was not of concern), there is no judge of Croatian nationality on the Court. There is therefore no basis to the Russian Federation's argument that Croatia's intervention would "irretrievably upset the balance between the Parties."¹²
19. Regardless, the Court, pursuant to its inherent authority to administer the case, has the power to craft such procedural rules as it deems necessary to ensure procedural fairness. The Court exercised such discretion in *Whaling in the Antarctic*, when it granted Japan's request that it be permitted to submit written observations in response to those submitted by New Zealand, even though such a submission is not contemplated in the Court's Statute or Rules. In that connection, and precisely in order to help ensure procedural fairness and the efficient resolution of the case, Croatia expressed in paragraph 15 of the Declaration of Intervention its willingness "to assist the Court in grouping its intervention together with similar interventions from other EU Member States for future stages of the proceedings, if the Court deems such a move useful in the interest of an expedient administration of justice." Croatia hereby reiterates that commitment and in this regard, in order to streamline the process also welcomes the decision of the Court in this case to ask for the written observations of the interveners on admissibility of their declarations with fixing an identical deadline for submission of these observations.

IV. Croatia is entitled to intervene under Article 63 of the Statute at the jurisdictional stage.

20. The Russian Federation badly mischaracterizes the Statute of the Court and its jurisprudence in arguing that its preliminary objections must be resolved before the admissibility of the Declaration of Intervention can be considered.

¹⁰ *Whaling in the Antarctic (Australia v. Japan)*, Declaration of Intervention of New Zealand, Order of 6 February 2013, I.C.J. Reports 2013, p. 8, para. 17.

¹¹ *Whaling in the Antarctic (Australia v. Japan)*, Declaration of Intervention of New Zealand, Order of 6 February 2013, I.C.J. Reports 2013, p. 9, para. 18. Moreover, the Court emphasized that an intervention under Article 63, which does not elevate the intervenor to the status of a party to the case, "cannot affect the equality of the Parties to the dispute."

¹² *Whaling in the Antarctic (Australia v. Japan)*, Declaration of Intervention of New Zealand, Order of 6 February 2013, I.C.J. Reports 2013, p. 9, para. 21 ("the presence on the Bench of a judge of the nationality of the intervening State has no effect on the right of the judge *ad hoc* chosen by the Applicant to sit in the case pursuant to Article 31, paragraph 2, of the Statute").

21. To begin with, the right of a State to intervene when the conditions set out in Article 63 are satisfied is unqualified. As there is no textual limitation restricting the phases in which an intervention can be made, a State is entitled to intervene under Article 63 in relation to a question of construction that arises in connection with any phase of a case. This is indicated by the provision's deliberate use of the word "*Whenever*" to describe when intervention under that article may occur. Indeed, Article 82 of the Rules of Court provides that intervening States shall file their declarations "as soon as possible." The right to intervene at any point is subject only to the requirement, set out in Article 82 of the Rules of Court, that absent extraordinary circumstances, the declaration of intervention must be filed not later than the date fixed for the opening of the oral proceedings. For this reason, "an intervention specifically directed to a phase of the proceedings other than the merits could succeed provided all other requirements are met."¹³ As Judge Schwebel observed, "intervention in the jurisdictional phase of a proceedings is within the scope of rights with which States are endowed by the terms of Article 63."¹⁴
22. While the Court in *Military and Paramilitary Activities* may have declined to admit El Salvador's intervention during the jurisdictional and admissibility phase of the proceeding, this was *not*, as the Russian Federation erroneously suggests, due to any obstacle to a State intervening under Article 63 in regard to a matter of construction that arises in a preliminary phase. To the contrary, unlike the Declaration of Croatia, El Salvador's intervention was not admitted because the Court determined that it did not concern matters of construction relevant to the questions of jurisdiction and admissibility then pending before the Court, which the Court had decided should be resolved as preliminary matters.¹⁵ In that regard, the Court's Order noted that the declaration was inadmissible in "the current phase of proceedings," inasmuch as it addresses matters "which presuppose that the Court has jurisdiction to entertain the dispute between Nicaragua and the United States of America and that Nicaragua's Application against the United States of America is admissible."¹⁶ As Judge Nagendra Singh underscored in his Separate Opinion, "It has been explained in paragraph 2 of the Court's Order that El Salvador's Declaration *in effect* appears directed to the merits of the case...".
23. The joint Separate Opinion of Judges Ruda, Mosler, Ago, Sir Robert Jennings and De Lacharriere emphasized this point as well. It observed that where the conditions set out in Article 63 are fulfilled, "a State wishing to intervene has a right to do so, and it is not for the Court to grant or withhold permission." Rather, the Court's only role is to decide "whether or not the conditions for such intervention, laid down in Article 63, are fulfilled."¹⁷

¹³ Matina Papadaki, *Intervention: International Court of Justice*, Max Planck Encyclopedia of International Law, para. 22.

¹⁴ See Opinion of Judge Schwebel in *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America) (Declaration of Intervention of El Salvador)*, Order of 4 October 1984, I.C.J. Reports 1984, p. 223, at pp. 235-236.

¹⁵ Order of 4 October 1984, citing Order of 10 May 1984.

¹⁶ Order of 4 October 1984, paragraph 2.

¹⁷ Paragraph 1.

24. The Separate Opinion then explained:

[W]e have voted with the majority of the Court in deciding that El Salvador's declaration of intervention is inadmissible in the present phase of the proceedings, because we have not been able to find, in El Salvador's written communications to the Court, the necessary identification of such particular provision or provisions which it considers to be in question in the jurisdictional phase of the case between Nicaragua and the United States; nor of the construction of such provision or provisions for which it contends. Furthermore, the brief references made in this regard have not convinced us that El Salvador's request is in accordance with what is contemplated by Article 63 of the Court's Statute.¹⁸

25. The Russian Federation is not assisted either by the fact that in the *Nuclear Test Case (New Zealand v. France)*, the Court decided to defer consideration of the application of Fiji to intervene in light of the Court's prior decision that the written proceedings should first be addressed to questions of jurisdiction and admissibility. Fiji's application was brought under Article 62 of the Statute of the Court – not Article 63, as Croatia has done here. Accordingly, Fiji could not avail itself of the right to intervene that Article 63 affords to parties to conventions the construction of which are in question. Moreover, unlike Croatia's Declaration in the present case, Fiji's application for leave to intervene concerned issues exclusively related to the merits, namely the harm that Fiji had alleged it had suffered and would suffer from atmospheric nuclear testing by France. The subject of Fiji's proposed intervention therefore did not concern the jurisdictional or admissibility questions then pending before the Court.

26. Here, as set out above and in Croatia's Declaration of Intervention, the construction of the Genocide Convention that its intervention addresses concerns Article IX and related provisions, matters which the Russian Federation has put in question. As such, Croatia is entitled to present its views on the proper construction of those provisions.

27. Nor, contrary to the Russian Federation's attempt to suggest otherwise, is a compromissory clause in a multilateral treaty, such as Article IX of the Genocide Convention, beyond the reach of an intervention under Article 63. As a distinguished commentator has observed:

If for example a case is brought on the basis of the compromissory clause in a multilateral convention, the interpretation of that clause may be of interest to all the other States parties (or at least those of them who have not made a reservation to the clause). It would therefore seem that there is no reason why intervention under Article 63 should not be possible to argue a question of jurisdiction or admissibility, if that question involves the interpretation of a multilateral treaty.¹⁹

¹⁸ Paragraph 3.

¹⁹ Hugh Thirlway, *The Law and Procedure of the International Court of Justice: Fifty Years of Jurisprudence*, Vol. I (2013), p. 1031 (internal citations omitted).

28. Notwithstanding the Russian Federation's invocation of the *travaux préparatoires* of the Court's Statute, the drafting history, in fact, reinforces the conclusion that a multilateral treaty's compromissory clause can be the subject of an intervention under Article 63. In the words of another commentator:

If the dispute over jurisdiction relates to the interpretation of a multilateral treaty which contains a compromissory clause or any other provision including another instrument intrinsically linked to that treaty, it is not self-evident why any other party to that treaty cannot intervene under Article 63 in any phase of the proceedings: *close examination of the legislative history of that provision in 1920 and of the initial Rules of Court of 1922 strongly indicates that this was precisely the intention behind that provision.*²⁰

V. The Declaration of Intervention Is Confined to the Construction of the Genocide Convention

29. Finally, there is no merit to the contention that the Declaration of Intervention is concerned with matters unrelated to the construction of the Genocide Convention. While the Declaration makes occasional reference to matters such as the Russian Federation's unlawful use of force, it does so only for purposes of describing the context in which Ukraine's claims have arisen or in relation to explaining Croatia's views concerning the proper construction of Article IX of the Genocide Convention. The scope of the intervention itself, however, is confined solely to the Convention's construction. As Croatia stated in paragraph 12 of the Declaration of Intervention: "Consistent with the restricted scope for interventions under Article 63 of the Statute, the Republic of Croatia will present its interpretation of the relevant Article of the Genocide Convention in line with Article 31 of the Vienna Convention on the Law of Treaties...". For the avoidance of doubt, Croatia reaffirms that understanding and intention. According to Article 31(3)(c) of the Vienna Convention on the Law of Treaties, representing customary international law²¹, the interpretation of a treaty may include "any relevant rules of international law applicable in the relations between the parties."

Conclusion

30. For the reasons set out above the Declaration of Intervention of the Republic of Croatia fully complies with the requirements under Article 63 of the Statute and Article 82 of the Rules. The objections to the admissibility of Croatia's Declaration of Intervention contained in the Russian Federation's Written Observations are wholly without merit.

²⁰ Rosenne's *Law and Practice of the International Court: 1920-2017*, Vol. III Procedure (Malcolm N. Shaw QC ed. 5th ed. 2016, p. 1533) (internal citation omitted) (emphasis added).

²¹ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar)*, Judgment of 22 July 2022, p. 31, para. 87: "The Court will have recourse to the rules of customary international law on treaty interpretation as reflected in Articles 31 to 33 of the Vienna Convention on the Law of Treaties of 23 May 1969";

Therefore, Croatia respectfully requests that all the objections to the admissibility of its intervention raised by the Russian Federation are rejected in their entirety and that the Declaration of Intervention under Article 63 of the Statute of the Republic of Croatia is declared admissible.

Respectfully,



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